



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(CONSTITUTIONAL & JUDICIAL REVIEW DIVISION)

MISCELLANEOUS CIVIL APPL. NO. 141 OF 2010

**IN THE MATTER OF: AN APPLICATION BY SPUR SECURITY SERVICES LIMITED
ORDERS OF JUDICIAL REVIEW UNDER ORDER LIII OF THE CIVIL PROCEDURE
RULES CHAPTER 21 OF THE LAWS OF KENYA**

AND

**IN THE MATTER OF PUBLIC PROCUREMENT AND DISPOSAL ACT, 2005 AND THE
SUBSIDIARY LEGISLATION MADE THEREUNDER**

BETWEEN

**REPUBLIC.....
.....APPLICANT**

VERSUS

**NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES
.....RESPONDENT**

***EX-PARTE* : SPUR SECURITY SERVICES
LIMITED**

JUDGEMENT

Introduction

1. By a Notice of Motion dated 23rd April, 2010, the ex parte applicant herein, **Spur Security Services Limited**, seeks the following orders:

1. **An order of Certiorari to forthwith remove to the High Court and quash the decision of the Respondent made and published vide The Standard Newspaper on 1/3/2010 in respect of leasing out of NSSF Car Parks under NSSF Tender No. 35/2009-2010.**
2. **An order of Prohibition to prohibit the Respondent from making an award in respect of NSSF Tender No. 35/2009-2010.**
3. **That the costs of this application be provided for.**

Ex Parte Applicant's Case

2. The same application was supported by a verifying affidavit sworn by **Moses Kigen**, the Marketing Manager of the ex parte applicant on 9th April, 2010.

3. According to the deponent, the Respondent vide an advertisement in the Daily Nation on 4/11/2009 invited tenders for leasing of a car park along Kenyatta Avenue, Nairobi, identified as Car Park "A" – Nairobi, under NSSF Tender No. 13/2009-2010. In response thereto, the Applicant purchased and subsequently submitted its tender for leasing thereof under NSSF Tender No. 13/2009-2010. It was deposed that the said tender was regulated by the provisions of the **Public Procurement and Disposal Act, 2005** (hereinafter referred to as "the Act") and subsidiary legislation made thereunder.

4. However, on or about 28th March, 2010, the attention of the deponent was drawn to an advertisement which appeared in the *Standard Newspaper* of 1st March 2010 purporting to invite bids for leasing of car parks including the car park being the subject of NSSF Tender No. 13/2009-2010 aforesaid. By the time he became aware of the said advert, he deposed, the deadline of NSSF Tender No. 35/2009/2010 which was on 24th March, 2010 at 11.00 am local time had expired and the applicant was unable to participate in NSSF Tender No. 35/2009-2010 for want of notification of termination of procurement proceedings of NSSF Tender No. 13/2009-2010. He deposed that the Applicant as a party who participated in NSSF Tender No. 13/2009-2010 did not receive notice of termination of the said tender prior to invitation of tenders by the Respondent for NSSF Tender No. 35/2009-2010.

5. According to him, since it is an express provision under the Act that a procuring entity is obliged to give prompt notice to each person who submitted a tender in the event of termination of procurement proceedings, the Respondent's decision and action to invite tenders under NSSF Tender No. 35/2009-2010 without notifying the Applicant of termination of procurement proceedings for NSSF Tender No. 13/2009-2010 is an act in breach of express provisions of the Act as well as rules of natural justice.

6. It was the deponent's view that the Respondent's decision and action aforesaid is unlawful, *ultra vires*, oppressive, vindictive and in breach of principles of natural justice and therefore amenable to judicial review by this court.

7. He further averred that the Applicant is apprehensive that the Respondent intends to make further decisions relating to evaluation and award if NSSF Tender No. 35/2009-2010 hence the orders sought herein.

Respondent's Case

8. On behalf of the Respondent, the following grounds of opposition were filed:

1. **It is frivolous and vexatious**
2. **It is in vain and overtaken by events**
3. **It is misconceived and lacks merit as Tender No. 35/2009 was neither evaluated nor awarded.**

Determinations

9. Having considered the application, the affidavit in support of the application, the grounds of opposition and the submissions filed herein, this is the view I form of the matter.

10. Although the respondent contended in its submissions that this application had been overtaken by events as the Tender No. 35/2009-2010 was neither evaluated nor awarded but that it entered into negotiation to sell the property to a third party who expressed interest in the purchase thereof, in the absence of any evidence presented by way of an affidavit to support this contention, the same cannot be taken seriously.

11. Section 36 of the Act provides as follows:

(1) A procuring entity may, at any time, terminate procurement proceedings without entering into a contract.

(2) The procuring entity shall give prompt notice of a termination to each person who submitted a tender, proposal or quotation or, if direct procurement was being used, to each person with whom the procuring entity was negotiating.

(3) On the request of a person described in subsection (2), the procuring entity shall give its reasons for terminating the procurement proceedings within fourteen days of the request.

(4) If the procurement proceedings involved tenders and the proceedings are terminated before the tenders are opened, the procuring entity shall return the tenders unopened.

(5) The procuring entity shall not be liable to any person for a termination under this section.

(6) A termination under this section shall not be reviewed by the Review Board or a court.

(7) A public entity that terminates procurement proceedings shall give the Authority a written report on the termination.

(8) A report under subsection (7) shall include the reasons for the termination and shall be made in accordance with any directions of the Authority with respect to the contents of the report and when it is due.

12. It is clear that the above provision does not require that the notification of the termination of the tender precedes the termination itself. What the section requires is that each person who submitted a tender, proposal or quotation be notified of the termination thereof and on request by such a person furnish the reasons therefor. However it is expressly stated that in the event of such termination the procuring entity shall not be liable therefor.

13. It is therefore clear that the applicant cannot question the decision by the Respondent to terminate the tender. Whereas the Respondent was under a statutory obligation to furnish the applicant with the reasons for the termination of the Tender, the consequences for the failure to do so, in my view, do not encompass the quashing of the decision to terminate the tender under the aforesaid provision. This however, does not mean that the applicant may not have recourse in law for the omission by the Respondent to be notified of the same. My view, however, is that such recourse cannot be by way of an application for *certiorari* as the applicant seeks in this application. Whereas it was alleged that the Respondent did not afford the applicant an opportunity of being heard before terminating the tender, as I have said no legal provision has been cited in support of the contention that a notice was a prerequisite to such termination. The provision simply says that the notice of termination be given *promptly*. That the Respondent is empowered by the Act to terminate the tender at any time without entering into the contract is not in doubt. There is no material placed before me to show that the decision to terminate the said tender was irrational. In the premises the orders sought herein cannot issue since the applicant has not shown that the decision to terminate the said Tender violated any of the principles warranting the grant of judicial review orders.

14. Accordingly, I find no merit in this Motion which is hereby dismissed but, as the Respondent did not prove that it complied with the requirement for the notification, there will be no order as to costs.

Dated at Nairobi this 23rd day of September, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr. Okubasu for Mr. Adipo for the Applicant

Cc Patricia